DEC 7 1994

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No.94-414

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SUSANA M. PACIFICO, Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT, Respondents

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Federal Circuit

BRIEF FOR THE PETITIONER IN REPLY

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether the long standing "Mail Box" rule is still the law of the land, especially in relation to present communication methods.

Whether the interests of the Government in the efficient operation of the court clerks office should take precedence over a litigant's right to their day in court.

Whether the petition for review of the decesion of the Merit Systems Protection Board was timely filed in the Federal Circuit

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OPINION BELOW

The judgment of the court of appeals (Pet. App. 13) is unreported.

JURISDICTION

The Court of Appeals entered its final decision April 21, 1994.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

The Petitioner in this case, Susanna Pacifico appealed from a decision of the Office of Personnel management. The Office of Personnel Management sent the decision to the wrong address, therefore

the Appellant's representative never saw the decision nor the appeal form, and the OPM forwarded the decision to the appellant herself which arrived on the 4th of July weekend approximately seven days late. Appellant then sent her appeal to the Merit Systems Protection Board (by facsimile) on July 21, 1992.
The Agency claimed untimeliness. A hearing was held in Los Angeles on October 19, 1992,

On November 18, 1992 the Administrative Law Judge of the MSPB, without addressing the merits of the case, ruled against Pacific and dismissed the appeal. Pacifico timely appealed for reconsideration by the MSPB on December 23, 1992. The MSPB denied reconsideration on March 19, 1993 and an appeal was taken to The United States Court of Appeals for the Federal Circuit. The Appeal was mailed postage prepaid on April 15, 1993 three

full days prior to the expiration of the appeal date. The case was docketed, briefs were submitted and the case was set for oral argument on April 4, 1994. On March 21, 1994 the Clerk of the Court of the Court of Appeals for the Federal Circuit removed the case from the docket as having been filed untimely. Appellant filed a motion for reconsideration on April 7, 1994. On April 21, 1994 the Court of Appeals for The Federal Circuit denied the motion and entered judgment. On May 4, 1994 the Appellant filed a motion for further reconsideration, which was denied.

ARGUMENT

It has been a long held principal of the Law of this country, both State and Federal that once a document is placed in the mails properly addressed it is deemed

to be delivered, and that it will reach its destination in a timely manner, in the proper course of the mails Federal Deposit Ins. Corp. v. Schaffer 731 F.2d 1134, 1137; Hagner v. United States 285 U.S. 427, 430 (1932) Rosenthal v. Walker 111 U.S. 185, 193.

The respondents have not provided any authority to show that this is no longer the accepted rule in this country. On the contrary several of their own cited cases uphold the rules that the presumption that a letter properly addressed and mailed is properly delivered and that this presumption is one that is not easily overcome. FDIC v. Schaffer 731 F.2d 1134, 1137 (4th Cir. 1988)

In City of Chicago v. United States Dep't of Labor 737 F.2d 1466 (7th Cir. 1984) the court held that a petition or an appeal is deemed filed once the court

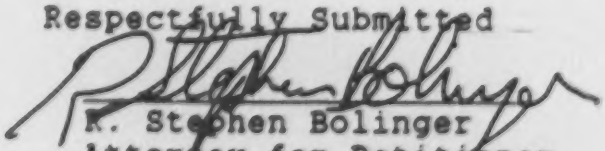
receives actual custody of the filing document. This is the contention of the Appellant, that under the presumptions of the mail box rule that mail is delivered timely in the normal course of postal business that the Court of Appeals had custody of the appeal timely. The stamp on the front of the document does not represent when the court took custody but rather when it appeared on the clerks desk as the appellant has set forth in her cited case of Charlson Realty Co. v. United States, 384 F.2d 434 Ct.Cl. 1967)

The respondents have not brought forth anything to show that the appeal and it's attendant envelope arrived at the Court House untimely. Once at the Courthouse it is no longer in transit and is in the custody of the court (See City of Chicago v. United States Dep't of Labor, 737 F.2d 1466. and Charlson Realty Company v. United States 384 F2d 434 (1967 Ct.Cl.).

CONCLUSION

It is only fair that the parties have a fair and level playing field. Both the OPM and the Merit Systems Protection Board, as well as the Courts, have chosen the United States Mail as the medium of exchange in this case; The petitioner should not be punished because she also chose the same medium.

Respectfully Submitted



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